

Abusive comparativism: “Pseudo-comparativist” political discourse as a means to legitimizing constitutional change in Turkey

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April 16, 2017 marked a historical turning point in Turkish constitutionalism, as a slim majority of voters (51.41% to be exact, as official numbers provided by the Turkish Supreme Election Council [indicate](#)) approved a set of constitutional amendments in a referendum vote, which, in essence, transforms the country's parliamentary system into, well, something else—what could be termed a presidentialist system with visibly less checks and balances, or as one [scholar put it](#), a “delegative democracy.” Recent [scholarship](#) has analyzed the nature of the amendments at considerable length, mostly focusing on how the President—who is now a lawfully partisan figure—will now exercise increased control over the Parliament and judiciary. One could say there is almost consensus among legal scholars in Turkey and elsewhere that the amendments serve to consolidate power in the hands of a few actors, and even possibly a single actor, that is, the President. The amendments, then, appear to have dealt a severe blow to the notion of constitutionalism in its classical sense, rooted in the idea of dispersing power as a means to ensuring individual liberties—a blow whose exact ramifications remain to be seen in the upcoming years.

There has been—and undoubtedly will continue to be—vibrant scholarly discussions on the effects of the amendments as well as on to what extent they undermine the notion of constitutionalism. I, however, would like to focus on something different: the constitutional amendment process has arguably weakened Turkey's already-fragile constitutionalist system. This is well known. What is less known and pretty much overlooked is that comparativism and specifically comparative constitutionalism itself has—arguably—suffered at the hands of Turkish political elites during the legal and political discussions that preceded the referendum.

Indeed, Turkish political elites, mostly but not exclusively MPs and Ministers of the governing party AKP, as well as President Erdogan have made numerous references to comparative law, and specifically to other constitutions, including Turkey's previous constitutions and current foreign constitutionalist systems, prior to the referendum, in an attempt to bolster the amendment package's legitimacy. Most—if not all—of these references to comparative law were shallow, incomplete, downright inaccurate and/or self-contradictory with the actual policies pursued by the governing elites. Borrowing David Landau's terminology “[abusive constitutionalism](#)”—simply defined as, legalistically speaking, the “lawful” use of constitutional amendment and/or replacement processes to promote undemocratic ends—during the discussions that led to the constitutional referendum, Turkey witnessed an episode of what could be termed “abusive comparativism,” that is, the distorted use of comparative law and legal systems as a means to legitimizing legal—and in this case constitutional—change that arguably does not promote democratic outcomes. Let me provide two concrete examples to illustrate my point:

Distortion of past Turkish constitutional experiences

To begin with, political elites supporting the referendum, in an attempt to enhance the amendment package's legitimacy, made reference to Turkey's past constitutionalist experiences. Particular attention was paid to Turkey's first proper constitution as a Republic founded in 1923, that is, the 1924 Constitution enacted by [Mustafa Kemal Atatürk](#), the founder and first president of the Republic. The 1924 Constitution did not enjoin the President from being affiliated with a political party. Accordingly, Mustafa Kemal and [Ismet Inonu](#), the first two presidents of the Republic, also happened to be chairpersons of the Republican's People Party (tr. *Cumhuriyet Halk Partisi*, abbreviated CHP), now the main opposition party for some time and the most vocal critic of the constitutional

amendments that passed on April 16. The new amendments, among other things, lift the ban on presidential neutrality in that the president can now become a member and even chairperson of a political party—just like during the 1924 Constitution. Current president Erdogan has quickly availed himself of this opportunity, [becoming a member](#) of his former political party AKP, which he had founded and led as Prime Minister until 2014. He is also expected to become the chairperson of the party in the coming days.

As the main opposition and others criticized the introduction of a partisan presidency, the Minister of Justice responded to criticisms, arguing that a presidential figure with open political affiliations was not a novelty in Turkish legal history, given that the first two presidents of Turkey were also leaders of the then-ruling, now main opposition party CHP. Describing the new amendments as “[a return to Atatürk-type constitutionalism](#),” the Minister went further and said that there were no problems back then with Mustafa Kemal and Ismet Inonu being president and party leader simultaneously. Reality, however, seems much more complex: (1) To begin with, under Mustafa Kemal’s rule, except two brief and unsuccessful attempts to establish opposition parties, Turkey was a single-party state. Thus, the comparison to the Kemalist-era constitutionalism is inapt. In a single-party state during the 1930s, concerns about presidential impartiality naturally did not arise, as there existed no other party against which the president could be accused of being biased. (2) Further, under the second president Ismet Inonu’s term, during which Turkey transitioned into a multi-party system, President Inonu’s party affiliations did become problematic, (it is noteworthy that up until the debates surrounding the constitutional amendments, Inonu-era constitutionalism has been [harshly criticized by President Erdogan](#) and other prominent party officials in the past as creating a functional dictatorship), to such an extent that President Inonu himself, though not officially stepping down from his role as chairperson of his political party, issued a voluntary statement in 1947, explicitly promising that he would remain impartial to all political parties. As seen, references to early Turkish constitutionalism as an example to be aspired to are neither appropriate (as a substantial period in that era was a single-party era anyway) nor correct (as President Inonu’s political affiliations did cause problems, despite assertions to the contrary made by some of the current political elites).

Distortion of current comparative constitutionalist systems

Abusive comparativism manifests itself not only in distorted mode of comparison with a jurisdiction’s own past, but also in distorted comparativism with contemporary foreign law. American presidentialism, most notably, was hailed as a model to strive for during the constitutional amendment debates. Just to give one example, an MP from the governing party insisted that the United States and France, too, had “[powerful presidents](#),” and that Turkey was merely following suit, perhaps quite consciously avoiding any reference to Latin American or African experiences with presidentialism. The same MP, who is also head of the parliamentary commission for constitutional amendments, prior to the referendum said that the Turkish constitutional amendments would make Turkey “[90% similar to the U.S. model](#),” and further argued that the amendments gave the Turkish presidency far less powers than its American counterpart. Setting aside the obvious question of when and how did the MP measure the level of similarity between the two constitutionalist systems and further found it to be 90%, the assertion that the Turkish presidency was granted far less powers than its American counterpart tactfully avoided details such as how the amendments gave the President the power to appoint high-level bureaucrats without parliamentary consent, significantly diverging from the American checks and balances arrangements.

Examples abound, but one thing becomes clear: political elites supporting the constitutional amendments have used past Turkish constitutional experiences and contemporary foreign constitutionalist systems to enhance the legitimacy of the constitutional amendments as they were being discussed in the Parliament and among the broader public. References to the founding era constitutionalism in Turkey serve to bolster the idea that the amendments purportedly connect back to the unique context in which the Republic was founded, thereby emphasizing the “autochthonous” and “local” nature of the new constitutionalist system. Simultaneously, references to France and the United States, as quoted above, and to other liberal democracies are made in an attempt to create the impression

that Turkey still remains within a liberal constitutionalist legal space, as—allegedly—many of the features brought by the amendments are found in other foreign liberal democratic constitutionalist systems. Yet, as demonstrated above, these references are often shallow and incomplete, and sometimes downright inaccurate. Cherry picking is a recurring problem, insofar as no reference is made to non-Western presidentialist systems that arguably share common features with the system the amendments have established.

In the end, comparative law ends up being distorted and (ab)used as mere rhetoric. Could the constitutional amendments that have been approved by a slim majority of the Turkish voters, then, have harmed not only liberal constitutionalism, but in addition, the comparativist legal enterprise more generally? Are comparative constitutional experiences invoked in a similarly shallow and, at times, inaccurate way—what can be called pseudo references—in other countries too? If so, can comparative legal scholars do anything to combat abusive comparativism?

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